UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

FREDERICK F. VILLAR,	)	
	)	
PLAINTIFF	)	
	)	
v.	)	**Civil No. 95-73-P-H**
	)	
RICETTA'S, INC., ET AL.,	)	
	)	
DEFENDANTS	)	

ORDER ON DEFENDANTS KERNAN'S AND STEPHAN'S MOTION FOR JUDGMENT ON THE PLEADINGS OR FOR SUMMARY JUDGMENT, DEFENDANT RICETTA'S, INC.'S MOTION TO DISMISS AND DEFENDANT KELLY'S MOTION FOR SUMMARY JUDGMENT

This lawsuit reflects a fight among the shareholders of Ricetta's, Inc., a local restaurant. I conclude that even on the view of the case taken by the plaintiff Frederick F. Villar, the minority shareholder, he is not entitled to dissolution of the corporation. The corporate defendant Ricetta's, Inc.'s motion to dismiss Count I therefore is **GRANTED**. Shareholder Villar also is not entitled individually to seek damages against Directors Peter E. Kernan, Ronald A. Stephan, Jr. and James E. Kelly for their alleged breach of fiduciary obligation and unjust enrichment because the damage, if any, is to the corporation. I therefore **GRANT** the defendants' motions on Counts II and IV because Villar has not brought a derivative action on the corporation's behalf. He is not entitled to recover for conversion and breach of fiduciary obligation against Director Kernan because he admits to facts that destroy that claim. I therefore **GRANT** Kernan's motion for summary judgment on Count III.

That leaves only the claim in Count V, a claim against the individual defendant, Kernan, based upon an alleged oral contract. On that count, the defendant Kernan's motion is **DENIED**.

DISSOLUTION REMEDY (COUNT I)

In his complaint, Villar seeks dissolution of the corporation, apparently under three alternative bases of 13-A M.R.S.A. § 1115—specifically, inability to conduct corporate affairs to the advantage of the shareholders generally; illegal or fraudulent acts by directors; and misapplication or waste of corporate assets. The defendants' motions have attacked all three bases, but in response to the motions, Villar has relied solely upon his argument that the corporate affairs can no longer be conducted "for the benefit of shareholders taken generally." Plaintiff's Objections to Motions by All Defendants for Judgment on the Pleadings or for Summary Judgment with Incorporated Memorandum of Law ("Pl.'s Objection"), at 12. I therefore treat the other bases as waived.[1]

Three provisions of section 1115 are relevant to Villar's argument. Subsection (1)(A) deals with divisions among directors of the corporation. Subsection (1)(B) deals with divisions among shareholders that prevent them from electing successor directors. Subsection (1)(C) deals with

[1] The sum of the plaintiff's argument as to the directors' fraudulent activities is his statement that "[i]t makes no difference whether the means employed are fraudulent or not. . . ." He then goes on to assert that "[i]n this case, the increase in salaries and benefits to unreasonable levels and contrary to a foundational understanding may be taken as fraudulent." Pl.'s Objection, at 12-13. The plaintiff fails to demonstrate how the facts, if proved, would satisfy the criteria for fraud or deceit under Maine case law. See Letellier v. Small, 400 A.2d 371, 376 (1979) (defendant is liable for fraud if he (1) makes a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) to induce another to act or refrain from acting in reliance upon it, and (5) the plaintiff justifiably relies on the representation as true and acts upon it to his damage); see also Arbour v. Hazelton, 534 A.2d 1303, 1305 (Me. 1987) (plaintiff must make prima facie case by clear and convincing evidence); see also Me. R. Civ. P. 9(b) (averments of fraud shall be stated with particularity).

shareholders who manage the corporation without directors and are so divided that they cannot conduct the business. See Thompson's Point, Inc. v. Safe Harbor Dev. Corp., 862 F. Supp. 594, 601 (D. Me. 1994); James B. Zimpritch, Maine Corporation Law & Practice § 11.7[a], at 395.

Ricetta's, Inc. has three shareholders and three directors as provided by its Articles of Incorporation and Bylaws. Thus, subsection (1)(C) involving shareholder-managed corporations does not apply. Ricetta's shareholders have been able to elect directors. Therefore, subsection (1)(B) does not apply. That leaves subsection (1)(A). It provides that dissolution is possible where:

> The directors of the corporation are so divided respecting the management of the corporation's business and affairs that the votes required for action by the board of directors cannot be obtained and the shareholders are unable to terminate the division, with the consequence that the corporation is suffering or will suffer irreparable injury, or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally; . . . .

It is clear from the language of (1)(A) that the premise for any dissolution is that the directors of the corporation are divided and cannot take action. See Thompson's Point, Inc., 862 F. Supp. at 601 (construing identical language at 13-A M.R.S.A. § 1115(1)(C)). That simply is not the case here. Instead, Villar's complaint is that the actions the directors have taken are not to his liking. That, however, can give him relief only if the directors' acts are illegal or fraudulent or if they are wasting or misapplying corporate assets, see 13-A M.R.S.A. § 1115(1)(D), (E), arguments that Villar has elected not to pursue. Accordingly, Villar is not entitled to dissolution of the corporation.

BREACH OF FIDUCIARY OBLIGATION AND UNJUST ENRICHMENT (COUNTS II AND IV)

Counts II and IV allege that in various ways the individual defendants, Directors Kernan, Stephan and Kelly, breached their fiduciary obligations with respect to the corporation or unjustly enriched themselves at corporate expense. Villar relies solely upon sections 624, 717 and 720 of Title 13-A M.R.S.A. Pl.'s Objection, at 13. Sections 624 and 720, by their terms, are unavailable to an individual shareholder unless he chooses to sue derivatively on behalf of the corporation, something Villar has not done. Section 717 deals only with whether a transaction between a corporation and its directors or officers is void or voidable (because of conflict of interest) and does not contemplate damage relief. In any event, to the extent it could afford such relief, the damage would be to the corporation and logically should be recoverable only by derivative action on behalf of the corporation. See Forbes v. Wells Beach Casino, Inc., 307 A.2d 210, 221 (Me. 1973) ("The derivative action is distinguished from an individual's action which is brought by a stockholder for a loss separate and distinct from that suffered by the other stockholders.")

BREACH OF FIDUCIARY OBLIGATION AND CONVERSION (COUNT III)

With respect to Count III charging conversion and breach of a fiduciary obligation by Kernan arising out of the alleged misappropriation of a corporate asset, Villar relies additionally upon 13-A M.R.S.A. § 716. Section 716 does establish the duty of directors and officers to discharge their duties in good faith "with a view to the interests of the corporation and of the shareholders," see Moore v. Maine Indus. Servs., Inc., 645 A.2d 626, 628 (Me. 1994), and arguably Villar has alleged a sufficiently "separate and distinct" injury (removal from the Board and as an officer and preferential treatment of other shareholders in distributions) to justify his individual, rather derivative, claims. See id. at 629-30. But Villar's own statement of material facts admits that the corporate asset in question was supplied "in consideration for Mr. Kernan's sale of his interest in Ricetta's [to Villar and Stephan]," Plaintiff's Statement of Fact Submitted in Support of Objection to Motions by All Defendants for Judgment on the Pleadings or for Summary Judgment ("Pl.'s Stmt.") ¶ 10, and that the latter deal fell through only because Villar and Stephan could not raise the money to pay the remainder of the buy out. Pl.'s Stmt. ¶ 11. Villar thereby admits that there was no conversion or breach of fiduciary obligation but merely his and Stephan's inability to perform an agreement through no fault of the defendant Kernan.

ORAL AGREEMENT (COUNT V)

Count V lies only against the individual defendant Kernan. It asserts that he and Villar, the two founding shareholders of the corporation, entered into an oral agreement "that Villar and Kernan would operate the business jointly and equally by a two person board and would share the profits of the business in proportions to share ownership,"[2] Plaintiff's Complaint ("Pl.'s Complt.") ¶ 76, and that "Kernan breached that oral agreement by the ouster of Villar from the corporation and the diversion of profits, from and after December 31, 1993." Pl.'s Complt. ¶ 77.

Kernan's first argument is that Villar loses on this claim because any shareholder agreement concerning the management of the corporation and relations among shareholders must be in writing. For that proposition he cites 13-A M.R.S.A. § 618 and Zimpritch, supra § 6.14. Both references do deal with written shareholder agreements and discuss how to make them enforceable. The concern, however, is for their effect on the corporation or on other shareholders who do not have knowledge

[2] Villar ultimately may have some difficulty with his proof here, since it appears that some modification to any such agreement should have occurred when he and Kernan each transferred shares of stock to Stephan at a later date. See Pl.'s Complt. ¶ 23.

of them. Neither the statute nor the treatise suggests that, if two shareholders voluntarily enter into an oral agreement, no damages would be available one against the other if one should then breach the oral agreement to the detriment of the other. As the treatise points out, "Section 618 . . . operates to validate certain arrangements which, but for Section 618, would be invalid. . . . Section 618 is unnecessary, and its limitations and formalities irrelevant, where an agreement or arrangement is otherwise valid." Zimpritch, supra § 6.14, at 190 (emphasis in original). I see no reason to foreclose a lawsuit for damages between the parties to an oral agreement merely because of section 618.

The more likely argument against recovery between two parties to an oral agreement is the statute of frauds, because the agreement was susceptible to not being performed within one year. See 33 M.R.S.A. § 51(5). As Kernan's own memorandum recognizes, this agreement is alleged to have existed and to have required compliance since 1988. Defendants' Motion for Judgment on the Pleadings or Summary Judgment with Incorporated Memorandum of Law, at 24. Kernan has not contested Villar's argument that part performance takes the contract outside the statute of frauds.

Finally, Kernan asserts that the complaint does not allege that an agreement was reached regarding how profits would be distributed or how the corporation would be managed. I conclude, however, that the Complaint is sufficient under the rules of pleading given its assertion that the parties agreed that "Villar and Kernan would operate the business jointly and equally by a two person board and would share the profits of the business in proportions to share ownership." Pl.'s Complt. ¶ 76.

Accordingly, the Clerk's Office shall enter judgment for the defendants Stephan, Kelly and Ricetta's, Inc. on the entire Complaint; and shall enter judgment for the defendant Kernan with respect to all aspects of the Complaint except Count V.

SO ORDERED.

DATED AT PORTLAND, MAINE THIS 21ST DAY OF FEBRUARY, 1996.

D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE